Supreme Court, U.S.
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No. 94-394

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TRANSPHASE SYSTEMS, INC.,

Petitioner,

v.

SOUTHERN CALIFORNIA EDISON COMPANY
AND SAN DIEGO GAS AND ELECTRIC COMPANY,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I. THIS COURT'S HOLDINGS IN OMNI OUTDOOR ADVERTISING AND CANTOR V. DETROIT EDISON CO. ANSWER QUESTION 1 AND ARE PROPERLY BEFORE THIS COURT. 1

II. THE UTILITIES' ARGUMENT WILL EVISCERATE THE FIRST PRONG OF THE MIDCAL TEST FOR ANY STATE-REGULATED PRIVATE PARTY. 4

III. THE LOWER COURTS SHOULD NOT BE ALLOWED TO DETERMINE THE "FACT-BOUND" ISSUE OF PUC CONTROL UNDER RULE 12(b)(6) WITHOUT EVEN CONSIDERING TRANSPHASE'S SUBMITTED EVIDENCE. 5

TABLE OF AUTHORITIES

CASES

Page(s)

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) 2,3,4,5

Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) 1,2,4

City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S.Ct. 1344 (1991) 1,2,4,5

City of Mishawaka, Indiana v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), cert denied, 436 U.S. 922 (1978) 2,3

City of Mishawaka, Indiana v. American Electric Power Company, 616 F.2d 976 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981) 2,3

Federal Trade Commission v. Ticor Title Ins. Co., _ U.S. _, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992) 2,3,4

Moor v. County of Alameda, 411 U.S. 693 (1973) 2

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). 1,2

Patrick v. Burget,
486 U.S. 94, 108 S.Ct. 1658,
100 L.Ed.2d 83 (1988) 2,3

Southern Motor Carriers Rate Conf. v. U.S.,
471 U.S. 48, 105 S.Ct. 1721,
85 L.Ed.2d 36 (1985) 2,3

Town of Concord, Mass v. Boston Electric Co.,
915 F.2d 17 (1st Cir. 1990),
cert. denied, 449 U.S. 931 (1991) 2,3

Yeager's Fuel, et. al. v.
Pennsylvania Power & Light,
22 F.3d 1260 (3rd Cir. 1994) 5

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES, AND RULES

Sherman Act § 1, 15 U.S.C. §1 3

Sherman Act § 2, 15 U.S.C. §2 . . . . . passim

Rule 12(b), Federal Rules
of Civil Procedure 5,6

CALIFORNIA STATUTORY PROVISIONS

Chapter 984, California Statutes of 1983 5

Cal. Pub. Util. Code § 454(a) 4

Transphase Systems, Inc. ("Transphase") hereby replies to Briefs In Opposition filed by Southern California Edison Company ("SCE") and San Diego Gas and Electric Company ("SDG&E").

I. This Court's Holdings in *Omni Outdoor Advertising* and *Cantor v. Detroit Edison Co.* Answer Question 1 And Are Properly Before this Court.

Question 1 (from SCE Opp. to Pet. at i):
Does the "state action" doctrine as enunciated in Parker v. Brown, 317 U.S. 341 (1943), and its progeny apply to private conduct alleged to be in violation of Section 2 of the Sherman Act? (emphasis added)

Answer:
"This does not mean, of course, that the States may exempt private action from the scope of the Sherman Act..." (emphasis in original)
City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 379, 111 S.Ct. 1341, 1353 (1991), citing and quoting Parker v. Brown, supra. See Pet. at 18. In both Omni and Cantor v. Detroit Edison Co., 418 U.S. 97 (1980), this Court has emphasized that the "state-action" doctrine may not be applied to exempt private conduct, particularly in a monopolization case where no natural monopoly exists. Pet. at 21, 22.

Transphase fully argued at both the Ninth Circuit and District Court courts that the state-action exemption is not available to utilities charged with monopolization, in reliance on Omni and Cantor, supra. SDG&E proclaims that because the lower courts did not "address" these holdings, the issues cannot be considered by this Court in reliance on Moor v.

County of Alameda, 411 U.S. 693, 696 n.3 (1973) et. al. (SDG&E Opp. to Pet. at 6). However, SDG&E has transposed the word "decided" from Moor, et. al. with "addressed" - in the process deceptively suggesting a new standard for the Court. Of course the lower courts in the case at bar "decided" that the state-action doctrine is available to the defendant private utilities; in fact, it was the sole basis upon which the Ninth Circuit granted respondents an exemption from federal law. Indeed, since Transphase petitions this Court from the Ninth Circuit's decision, the state-action doctrine's availability and application to the respondent private utility corporations are the only issues properly before this Court.[1]

Both SCE and SDG&E solely rely on Patrick v. Burget, 486 U.S. 94 (1988), to attempt to discredit Transphase's distinguishment between Cantor, Town of Concord, and City of Mishawaka I and II, involving Section 2 monopolization claims against private parties where the Courts found state-action immunity totally inapposite; and Parker, Midcal, So. Motor Carriers, and FTC v. Ticor, involving conspiracy claims wherein the State's action might vitiate the private

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[1]Both SCE and SDG&E raise other arguments they forwarded in support of their Rule 12(b)(6) motions, again neglecting to mention that the District Court explicitly allowed Transphase leave to amend its Original Complaint should immunity be unavailable. Pet. at 6, App. 16a, n.10. The Ninth Circuit also rejected *sub-silentio* Noerr-Pennington immunity in the case at bar because Transphase's monopolization claims do not challenge SCE and SDG&E's right to petition the State or California Public Utilities Commission ("CPUC") for anything, but rather challenge their private acts which may indirectly result from the outcome of the CPUC proceedings. See Omni, supra, 111 S.Ct. at 1354.

conspiracy.[2] While the Patrick decision is unclear on the point, the jury returned a verdict on the §2 claims against all the defendants, 486 U.S. at 98. Since the violation was incurred by individual surgeons operating in the same geographic and product market, this suggests a conspiracy to monopolize rather than an actual monopolization.

As noted in Transphase's Petition at 20, n. 6, conspiracy to monopolize should be grouped with §1 conspiracies in restraint in trade for purposes of a "state-action" analysis because a private conspiracy can be obviated by the State's action. Also, the underlying question of whether the state-action doctrine applied to private conduct was not at issue in Patrick, supra. Further, Transphase's distinguishment would not disturb Patrick's decision that state-action immunity was unavailable to the defendants in that case.

Both SCE and SDG&E emotionally emphasize that Transphase's argument, if adopted, would lead to repeated monopolization attacks against utilities across the country. First, that is an argument that should be made to Congress, which enacted the Sherman Act, not the judiciary. Second,

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[2]See Town of Concord, Mass. v. Boston Electric Co., 915 F.2d 12 (1st Cir) cert. denied, 449 U.S. 931 (1991), City of Mishawaka, Indiana v. Indiana and Michigan Electric Co., 560 F.2d 1314 (7th Cir), cert. denied, 436 U.S. 922 (1978) (Mishawaka I); City of Mishawaka, Indiana v. American Electric Power Co., 616 F.2d 976 (7th Cir.), cert. denied 449 U.S. 1096 (1981) (Mishawaka II); California Retail Liquor Dealer's Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Southern Motor Carriers Rate Conf. v. U.S., 471 U.S. 48 (1985); FTC v. Ticor Title Ins. Co., 112 S.Ct. 2169 (1992).

where this Court has addressed this concern, in FTC v. Ticor, 112 S.Ct. at 2180 et. seq., and Cantor v. Detroit Edison, 428 U.S. at 598 et. seq., it has found the policies of the Sherman Act to override any concern over litigation against private parties. Finally, establishing monopolization in violation of Section 2 of the Sherman Act is a difficult proposition, with the plaintiff needing to prove at trial monopoly power in the relevant market, predatory conduct and causal antitrust injury. If the defendants are not violating a federal law, then they will not be found liable.

II. The Utilities' Argument will Eviscerate the First Prong of the Midcal Test for any State-Regulated Private Party.

If the state-action immunity doctrine is available, then the utilities must satisfy both prongs of the Midcal test. See FTC v. Ticor, supra, Pet. at 24. However, the utilities argue, and the lower courts here held, that the first prong of the Midcal test is inapplicable to any state-regulated corporation.

Every California statute and code section cited by Transphase and the utilities provides the California Public Utilities Commission with an authority to regulate. But if that is all that is required, as the utilities maintain, every state-regulated corporation across the country passes the test by definition. Indeed the utilities continue to uphold the District Court's reliance on PU Code §454 (a), a code dating back to 1915 that has nothing to do with the energy efficiency marketplace, as the basic authority meeting Midcal's first prong.

There may never be another case where the State, through its statutes and codes, more clearly articulates a

policy promoting competition and opposing the utilities' "status as monopolies to dominate the energy conservation industry or [their] exercise of unfair market power." Chapter 984, Stats. 1983, Pet. at 4. This Court should refocus the inquiry on the State's intent to promote or displace competition, and not allow lower courts to read Midcal's first prong out of existence. See Omni, supra, Pet. at 25.

III. The Lower Courts Should Not Be Allowed to Determine the "Fact-Bound" Issue of PUC Control Under Rule 12(b)(6) Without Even Considering Transphase's Submitted Evidence.

Nowhere in SCE's 81 pages of CPUC documents submitted to this Court does the CPUC specify the energy efficiency rebate prices of $0, $100, $200, and $600 per kilowatt foisted on the marketplace by SCE and SDG&E. Nowhere does the CPUC command the utilities to destroy the energy efficiency marketplace by now instituting a price of $0 per kilowatt.[3] These prices - and lack of CPUC approval or consideration of them - are all facts which Transphase could and did substantially prove in its submission to the District Court and which the Ninth Circuit and District Courts refused to consider.

SCE further misleads this Court by suggesting that the District Court in Yeager's Fuel converted the utility's Federal Rule 12(b)(6) Motion to Rule 56 motion for

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[3]In fact, the CPUC, under its cost-effectiveness test, provides the utilities broad authority to set the price at anywhere between $0 per kw and up to $6000 per kw (the higher-end price that SCE and SDG&E pays to independent power producers). See Pet. at 8,9, n. 2.

summary judgment on an issue not related to state-action immunity (SCE Opp. to Pet. at 28). To the contrary, as the Third Circuit noted, "Attached to [the utility's 12(b)(6)] motion were various documents offered in support of its state action immunity defense." 22 F.3d at 1272. From the Third Circuit's discussion, it is clear that the documents in question were PUC documents, and the attachment of those documents to the 12(b)(6) motion triggered the District Court's conversion to a motion for summary judgment.

There is a conflict here between the Third Circuit, the plain meaning of the words of Rule 12(b), and the notes to Evidence Rule 201(b), on the one hand, and the Ninth Circuit and District Courts in the case at bar. The Courts below made grossly improper "fact-bound" determinations on a 12(b)(6) motion without considering Transphase's submitted evidence.

IV. Conclusion

The utilities should not be allowed sweeping immunity from the most basic national policy of a competitive and free marketplace embodied in Section 2 of the Sherman Act. Transphase's Petition for Certiorari should be granted.

Respectfully submitted,

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